

FILED

JUL 17 1961

JAMES K. BROWNING Clerk

No. [REDACTED] 144

IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

STATE BOARD OF INSURANCE, ET AL,
Petitioners

v.

TODD SHIPYARDS CORPORATION,
Respondent

**PETITIONER'S ANSWER TO RESPONDENT'S BRIEF
IN OPPOSITION TO PETITION FOR CERTIORARI**

WILL WILSON,
Attorney General of Texas

C. K. RICHARDS,
Assistant Attorney General

FRED B. WERKENTHIN,
Assistant Attorney General

BOB E. SHANNON
Assistant Attorney General
Counsel for Petitioners
State Board of Insurance, et al
Capitol Station
Austin 11, Texas

INDEX

	Page
Citations to Opinions Below	i
Statement	1
Reply to Respondent's Question Number One	1
Reply to Respondent's Question Number Three	5
Conclusion	11

CITATIONS

Cases:

Allgeyer v. Louisiana, 165 U.S. 528 (1896)	2, 3, 4
Durley v. Mayo, 351 U.S. 277	4
Hanover Fire Insurance Co. v. Carr, 272 U.S. 494	10
McGeldrick v. Campangnie Generale, 309 U.S. 430	5
St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922)	2, 3, 4
Stembridge v. Georgia, 343 U.S. 541	4
Wheeling Steel Corp v. Glander, 337 U.S. 562	9, 10

Statutes:

Texas Insurance Code, Vol. 14, Vernon's Annotated
Civil Statutes

Article 21.38, Section 2(e)	cited throughout
Article 4769	6, 7
Article 7064	6, 7
Article 7064a	6, 7

Others:

16 CJS §76, page 236	8
----------------------------	---

No. 1030

IN THE
Supreme Court of the United States
OCTOBER TERM, 1960

STATE BOARD OF INSURANCE, ET AL,
Petitioners

v.

TODD SHIPYARDS CORPORATION,
Respondent

**PETITIONER'S ANSWER TO RESPONDENT'S BRIEF
IN OPPOSITION TO PETITION FOR CERTIORARI**

Statement

The Respondent, in its brief in answer to the petition for writ of certiorari, has raised two points not discussed in the petition for writ of certiorari, and for that reason the Petitioners file this reply brief.

Reply to Respondent's Question Number One

The Respondent, in its brief in opposition to the application for writ of certiorari, has questioned the jurisdiction of the Court to entertain this matter. Its position is that the Texas Supreme Court, in refusing

to grant the writ of error urged by the Petitioners by the notation of "ref. no rev. error," possibly grounded its basis for refusal on State constitutional grounds.

This argument is without merit for two main reasons: First of all, it is the judgment of the Court of Civil Appeals of Texas that the writ of certiorari prays be reviewed since the Supreme Court of Texas refused to grant Petitioners' writ of error. It is true that both State and Federal constitutional grounds were urged in the Court of Civil Appeals as reasons for reversing the judgment of the trial court. But it is crystal clear, upon a reading of the opinion of the Court of Civil Appeals, that it chose to invalidate Article 21.38(2) (e) of the Texas Insurance Code as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. That court explicitly stated the basis of its judgment in its opinion found on page C-7 of the appendix to the petition for writ of certiorari: "We believe that the invalidity and unconstitutionality of this statute is established by the opinion of the United States Supreme Court in *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346 . . ." The *St. Louis* case decides that a state statute is a violation of the due process clause of the United States Constitution and, of course, that decision has nothing to do with the due process clause of the Texas Constitution.

The Court of Civil Appeals again states the basis of its judgment when it opines that it is its duty to follow the *St. Louis Compress* and the *Allgeyer v.*

Louisiana cases until such time as the United States Supreme Court overrules them.

Secondly, the per curiam opinion of the Texas Supreme Court in plain language reveals the reason it refused the Petitioners' writ of error. In Appendix "D" of the petition for writ of certiorari, there appears the opinion of the Supreme Court of Texas:

"We are of the opinion that the decision in this case is controlled by Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 L. ed. 832 and St. Louis Cotton Compress Company v. State of Arkansas, 260 U.S. 346, 43 S. Ct. 125, 67 L. ed. 297. . . . We abide by what the Supreme Court has held and refuse to speculate upon what said Court may hold. . . ." (Emphasis added.)

The Texas Supreme Court simply said that two Supreme Court cases, which decide rights under the Federal Constitution, control the present case. The Respondent speculates about the reason and effect of the refusal of the Petitioners' writ of error with the notation of no reversible error. The office of the per curiam opinion is to explain the reason for the refusal of the writ of error, which this per curiam opinion does admirably well—that the case is controlled by the *Allgeyer* and *St. Louis Compress* cases. And the Supreme Court refused to speculate, as did the Court of Civil Appeals, what the United States Supreme Court would hold on certiorari or appeal.

The cases cited by the Respondent in its answer to the petition for writ of certiorari are not in point here. In *Stembridge v. Georgia*, 343 U.S. 541, the Georgia Supreme Court wrote no opinion to indicate what ground its judgment was based on. Here the Texas Court of Civil Appeals and the Texas Supreme Court both wrote opinions setting forth the grounds relied upon. In *Durley v. Mayo*, 351 U.S. 277, relied upon by the Respondent, there was involved a *habeas corpus* proceeding which was refused by the Florida Supreme Court by an order stating that the petitioner had "failed to show . . . probable cause to believe that he is detained in custody without lawful authority . . ." The United States Supreme Court refused certiorari and said in part, "We find nothing on its face showing that the court must have decided the case on federal grounds rather than on the readily available and substantial state grounds." On the contrary, in the case at bar, there is an abundance of evidence showing the grounds for the judgments of both the Texas Court of Civil Appeals and the Texas Supreme Court. The opinions of both of these courts state the grounds for their decision—*St. Louis Cotton Compress Co. v. Arkansas* and *Allgeyer v. Louisiana*—which in turn invalidate state statutes as violations of Federal due process.

The Respondent has also challenged the jurisdiction of this Court on the basis that the many and various State officials sued by the Respondent were collectively termed "The State of Texas" for reasons of simplicity and brevity in the application for

writ of error filed in the Texas Supreme Court. With the answer to the Respondent's brief, Petitioners are filing, as a supplement to the record in this suit, an instrument called an "Instrument to Clarify the Identity of the Petitioners," which was filed in the Texas Supreme Court on December 12, 1960, before any action was taken by that court. That instrument fully explained the identity of the Petitioners as being the same as in the trial court and the Court of Civil Appeals, and that the term "State of Texas" had been substituted for the many individual State officials for purposes of simplicity and clarity.

Reply to Respondent's Question Number Three

In the Respondent's question number three, it seeks to support the judgment of the State courts on the basis of the equal protection clause of the United States Constitution that, although presented, was not reached or passed upon below. The Petitioners doubt that this issue is before this Court, cf. *McGoldrick v. Campannie Generale*, 309 U.S. 430, but nevertheless answer these contentions.

The Respondent suggests that Article 21.38, Section 2(e), discriminates in favor of domestic insurance companies and against foreign insurance companies. This suggestion has no merit for the following reasons.

In the first place, Article 21.38(2) (e) does not discriminate against *foreign* insurers in favor of

domestic insurers. If it discriminates against anyone at all, it discriminates against *unauthorized* or *unregulated* insurers. An unauthorized insurer is simply any insurance company not licensed by the State Board of Insurance to sell insurance in Texas. Under the terms of the statute, it is immaterial where the residence of the unauthorized insurance company is, but the material point is whether or not the company is authorized to do business here. Article 21.38 (2) (e) applies to a variety of situations: Texas insurance companies that have never complied with the licensing laws of this State; Texas insurance companies that are licensed for one type of insurance, but are selling additional lines; unauthorized out-of-state companies; and unauthorized foreign companies. Nowhere in the Article does it say that an unauthorized company means a foreign company.

The Respondent seeks to make out discrimination against foreign insurance companies by comparing Article 21.38 (2) (e) with completely dissimilar state taxes. Articles 4769, 7064, and 7064a do not place a tax on persons buying insurance, but rather place a tax on insurance companies. Article 21.38 (2)(e) places its tax on the *insureds*, and not on insurers. It is apparent that these are two separate and different taxes which tax different subjects. Merely because an insurance company pays a lower tax than an individual in a different taxing situation is no basis to compare two entirely different taxes, and then complain of discrimination between rates. The incidence of the tax in Articles 4769,

7064, and 7064a is the *receipt of gross premiums by insurance companies*, while the incidence of the tax in Article 21.38 (2)(e), is *payment of premiums by insureds on Texas risks to unauthorized insurers*. It is manifest that these are entirely different taxes, with no basis for comparison.

Even if it be assumed that Article 21.38 (2)(e) is a tax on unauthorized insurers, it is apparent that there is no discrimination because, as stated in a footnote on page 12 of the petition for writ of certiorari, authorized companies pay various taxes which aggregate 5% or more of the gross premiums taxed.

Another flaw in Respondent's argument of discrimination by Article 21.38 (2)(e) against foreign insurance companies is that in this lawsuit there is no foreign insurance company or domestic insurance company, for that matter, involved. The Respondent is Todd Shipyards Corporation, a builder and repairer of ships and certainly by no stretch of the imagination an insurance company. Lloyds of London, the Respondent's insurer, the Respondent was careful to point out in its due process argument in its brief, is not a party to this suit and does not do business in Texas. At best, then, the Respondent is only an insured seeking to challenge the constitutionality of a state statute for its insurer. The Respondent would assume the role of its insurer so that it could raise the issue in this case of whether or not Article 21.38, Section 2(e), was discrimina-

tory against foreign insurers. The rule has been well-stated as follows:

“A person is ordinarily precluded from challenging the constitutionality of governmental action by invoking the rights of others, and it is not sufficient that the statute or administrative regulation is unconstitutional as to other persons or classes of persons . . .” 16 CJS, §76, p. 236.

Certainly Todd has no standing to challenge this statute on the basis that it discriminates against foreign insurers in favor of admitted insurers when it is not an insurance company. Were Lloyds of London party to this lawsuit, it could have legitimately raised this issue.

Then Respondent complains of discrimination from another standpoint. It complains that the Legislature, in limiting the tax of Article 21.38, Section 2(e), to persons insuring Texas risks with unauthorized insurers, was discriminatory against these persons and in favor of all those persons who did not purchase with unauthorized insurers. The Respondent's position seems to be that the classification of Article 21.38 (2)(e) is discriminatory and unreasonable because it does not encompass every insured in the State. The fallaciousness of this argument is apparent. Of course, anytime the Legislature selects a group to tax there are some persons who are not included in the class and who do not have to pay. This does not mean that the Legislature

is discriminatory in favor of these people and against those included in the taxable class. It is well settled that the Legislature has the power to classify objects for the purpose of taxation. The class of taxpayers set up by Article 21.38, Section 2(e), constitutes a particular class under the law; none within that class are exempt from the tax. It is only when individuals of a class are singled out for exemption that this constitutional objection is operative.

The legal test that this classification of taxpayers must pass is whether or not there exists a reasonable basis for this classification. The practice which this Article sought to prevent must be kept in mind, i.e., that some Texas insureds were purchasing insurance from unsupervised and unregulated companies. Upon this group, the tax was levied. The tax was not placed upon all persons insuring property in Texas, for there was no need to do so since most of them insure with regulated companies. In Petitioners' writ for certiorari, the hazards involved in insuring with unregulated companies were detailed, as was the necessity for plugging all possible leaks in the State's regulating scheme, and Petitioners will not at this time repeat. Suffice it to say, Petitioners believe that there exists ample evidence of the reasonableness of this legislation.

For these reasons, the authorities that Respondent has cited to the Court are inapplicable. The *Wheeling Steel Corp. v. Glander* case, 337 U. S. 562, cited by the Respondent, involved an Ohio statute

specifically exempting resident owners of intangibles from the tax while placing the identical tax on non-residents. This statute in no way resembles Article 21.38, Section 2(e). The Ohio statute taxes non-residents while exempting residents in the same situation. Article 21.38 (2) (e) taxes all persons who purchase insurance from unauthorized insurers without regard to their residence. Also, Article 21.38, Section 2(e), makes no attempt to discriminate in any way between foreign or domestic insurers—its basis for distinction is whether or not the company has a license to do business in Texas. An unlicensed company could be a domestic or foreign insurance company. The facts of the *Glander* case are not similar to those in this case. There the non-resident taxpayer upon whom the tax was placed was bringing the lawsuit claiming a denial of equal protection. In the case at bar, the Respondent claims a State denial of equal protection of foreign insurance companies. As said before, the Respondent is not a foreign insurance company and has no standing even to make an issue of this supposed discrimination.

Hanover Fire Insurance Co. v. Carr, 272 U.S. 494, is equally inapplicable to the case at bar because there, Illinois, by judicial decision, taxed foreign insurance companies licensed to do business in Illinois at a much higher rate than domestic insurance companies. Here again, it will be pointed out that Article 21.38, Section 2(e), does not classify its objects of taxation by residence.

Conclusion

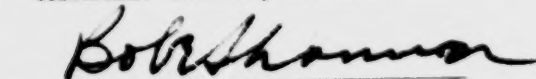
For the foregoing reasons, and those contained in the petition for writ of certiorari, Petitioners submit that certiorari should be granted.

Respectfully submitted,

WILL WILSON,
Attorney General of Texas


C. K. RICHARDS,
Assistant Attorney General


FRED B. WERKENTHIN,
Assistant Attorney General


BOB E. SHANNON
Assistant Attorney General

Counsel for Petitioners
State Board of Insurance, et al

Capitol Station
Austin 11, Texas